

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F704110

JOHN T. MORGAN,
EMPLOYEE

CLAIMANT

MCCOY TREE SURGERY,
EMPLOYER

RESPONDENT

COMPANION PROPERTY & CASUALTY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 7, 2008

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by the HONORABLE NEAL L. HART,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WILLIAM BIRD
and the HONORABLE JOSEPH PURVIS, Attorneys at Law,
Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed January 2, 2008. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On April 16, 2007, the relationship of employee-employer-carrier existed between the parties.
3. On April 16, 2007, the claimant earned wages sufficient to entitle him to weekly compensation

benefits of \$358.00 for total disability and \$269.00 for permanent partial disability, should such benefits have been appropriate.

4. The evidence presented establishes that the claimant's allegedly insurance occurred when the claimant was engaged in "horseplay". Thus, it would be expressly excluded from the definition of a "compensable injury" by Ark. Code Ann. §11-9-102(4)(B)(i).

5. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a "compensable injury" to his lower back or lumbar spine on April 16, 2007. Specifically, he has failed to prove by the greater weight of the credible evidence the occurrence of any physical injury to his lower back or lumbar spine, on April 16, 2007, that arose out of and occurred in the course of his employment with the respondent.

6. The respondents have denied the occurrence of a compensable injury to the claimant's low back on April 16, 2007, and have controverted this claim in its entirety.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

The claimant alleges that he sustained compensable injuries that are governed by the Arkansas Workers'

Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injuries are, indeed, injuries that are covered by the Act; however, the claimant has failed to establish the elements necessary to prove these compensable injuries by a preponderance of the evidence.

Therefore we affirm and adopt the January 2, 2008 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion. The majority, by affirming and adopting the decision of the Administrative Law Judge, finds that the claimant was injured while he engaged in horseplay on April 16, 2007. I disagree. Based on a de novo review of the record, I find that the claimant was not engaged in horseplay when he was thrown from a

moving vehicle on April 16, 2007. I find that the claimant sustained a compensable specific incident back injury and I would award benefits accordingly.

The claimant is a foreman for the respondent's tree service. While the claimant worked for the respondent, the respondent would provide transportation for the claimant and other workers to various work sites in the woods. These work crews would travel to the designated work sites on a "Gator," a four-wheeled all-terrain utility vehicle. The Gator has two front seats and a flat bed in the back on which passengers ride. The Gator has a roll bar but no seatbelts. The vehicle specifications list 20 m.p.h. as the top speed of a Gator vehicle.

On April 16, 2007, the claimant was working in the woods with his logging team. The team of employees was required to travel on the company-supplied Gator to and from the main work trucks. The claimant credibly testified that the respondent's driver, Sean Badeaux, was driving in an unsafe manner. The claimant testified that he told Mr. Badeaux multiple times that he was driving too fast and that he was driving in a dangerous manner on the narrow logging trails. All the co-worker witnesses stated that the claimant was upset by the way

Mr. Badeaux was driving. Furthermore, the claimant and the witnesses testified that the claimant actually got off the Gator at a stop and stood near the vehicle in an attempt to communicate how unsafe he thought Mr. Badeaux was driving. At the hearing, the claimant's manager, Murl Robinson, testified that he felt Mr. Badeaux required a training course after driving in an unsafe manner:

Q: And based upon what the other guys had written, you determined that they needed a training course, use equipment in appropriate manner, and that someone else should be driving this thing; is that true?

A: That's what I think should be done on it where we can not have these problems, yes.

Additionally, I find it unreasonable to conclude that horseplay on the part of the claimant, a passenger in the vehicle, was the cause of the injury, when the logical conclusion is that the high rate of speed, the design of the Gator vehicle, and the sharpness of the turn taken by Mr. Badeaux, as testified to by the claimant and other witnesses, was the cause of the injury.

Furthermore, the majority's conclusion is totally contradicted by the evidence of record. I find

no indication that the environment preceding the injury was jovial or lighthearted. There was no horseplay. Indeed, from the testimony of the claimant, Mr. Badeaux, and Mr. Jones, I find that the environment preceding the injury was charged with animosity and aversion between Mr. Badeaux and the claimant, and utterly devoid of horseplay.

Furthermore, the majority's conclusion that it was physically impossible for the claimant to be injured in the manner he described is sheer conjecture and speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. Lohman v. SSI, Inc., 94 Ark. App. 424, 232 S.W.3d 487 (2006). The claimant testified that he was in a semi-seated position, facing left, holding on to a headlight and the roll bar on the Gator. Without having actually seen the vehicle, the accident site, or the accident itself, the majority cannot reasonably controvert the claimant's credible testimony as to what actually happened as the Gator made the turn. I find that the majority and the Administrative Law Judge, without such credible evidence of what actually happened speculates too much with such a conclusion. Even more incredible is that if one accepts the majority's conclusion, one must conclude

that the claimant threw himself out of a moving vehicle for fun. This theory of the case is not only not supported by the evidence of record, it flies in the face of logic.

To reach this illogical conclusion, the majority disregards the claimant's credible testimony in favor of the testimony of two co-workers who have a vested interest in being found without fault in the incident. The testimony of an interested party is always considered to be controverted. Continental Express v. Harris, 61 Ark. App. 198, 965 S.W.2d 811 (1998). Moreover, the Arkansas Supreme Court has held that the Commission may not arbitrarily disregard the testimony of any witness. Hapney v. Rheem Mfg. Co., 342 Ark. 11, 26 S.W.3d 777 (2000). Mr. Jones' testimony was shown to be inconsistent with the immediate report he wrote out as well as the report his wife wrote for him. Similarly concerning is the fact that the driver of the Gator, Mr. Badeaux, had a history of arguments with the claimant, demonstrating hostility and the motive for erratic driving with the claimant in the passenger seat of the off-road vehicle. I find that Mr. Jones' and Mr. Badeaux's testimony should be given minimal weight and

that the claimant's testimony regarding how the accident happened was arbitrarily and erroneously disregarded.

In conclusion, based on the preponderance of the evidence of record, I find that the claimant was not engaged in horseplay when he was thrown from a moving vehicle and sustained a compensable lower back injury on April 16, 2007.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner